
UTAH LABOR COMMISSION

S. DUANE AINGE,

Petitioner,

vs.

**ZIMMERMAN EQUIPMENT CO. and
WORKERS COMPENSATION FUND,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 04-0531

Zimmerman Equipment Co. and its insurance carrier, Workers Compensation Fund, (referred to jointly as "Zimmerman") ask the Utah Labor Commission to review Administrative Law Judge Lima's award of benefits to S. Duane Ainge under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Mr. Ainge seeks medical benefits and permanent total disability compensation for a back injury allegedly caused by his work at Zimmerman on July 7, 2003. After an evidentiary hearing, Judge Lima concluded that Mr. Ainge was entitled to a preliminary finding of permanent total disability and payment of medical expenses.

Zimmerman now asks the Commission to review Judge Lima's decision. Specifically, Zimmerman argues that Judge Lima's preliminary finding of permanent total disability is improper because: 1) Judge Lima's subsidiary finding that Mr. Ainge "cannot perform other work reasonably available" is based entirely on hearsay evidence and, therefore, violates the "residuum rule"; and 2) Mr. Ainge failed to cooperate with Zimmerman's offer of vocational services.

FINDINGS OF FACT

The Commission adopts Judge Lima's findings of fact. As material to the issues raised in Zimmerman's motion for review, those facts can be summarized as follows:

On July 7, 2003, while working for Zimmerman, Mr. Ainge attempted to slide or push an object weighing about 350 pounds off the forks of a forklift. As he did so, he felt a sharp pain in his back. He sought medical attention the next day. Ultimately, he was diagnosed with pre-existing degenerative disc disease and spinal osteoarthritis which was permanently aggravated by his work exertion at Zimmerman.

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Mr. Ainge has a 7% whole person impairment for his spinal problems, with 2% due to his preexisting condition and 5% due to his work injury at Zimmerman. He is limited in the length of time he can sit, stand or walk. He requires lengthy rest periods during the day. He also requires pain medication.

Mr. Ainge was born in November 1943 and is now 64 years old. He has a 10th grade education. His work experience is limited to military service, truck driving, laborer, and equipment operator. After his work injury at Zimmerman, he visited his local Job Service office but was not given any work referrals. The Job Service representative told Mr. Ainge that, in light of his physical condition, "no employer would have him."

Mr. Ainge met with or spoke to Zimmerman's vocational counselor on four occasions. During the last such contact, the counselor offered to help Mr. Ainge find work. Mr. Ainge declined because he believed he was unable to work.

DISCUSSION

Judge Lima found that Mr. Ainge satisfied each element of § 413(1) of the Utah Workers' Compensation Act necessary for a preliminary determination of permanent total disability. Zimmerman challenges only two aspects of Judge Lima's decision. First, Zimmerman contends that Mr. Ainge failed to submit sufficient evidence to prove that he "cannot perform other work reasonably available," as required by 413(1)(c)(iv) of the Act. More specifically, Zimmerman argues that the only evidence supporting Judge Lima's finding on this point is hearsay, and that such hearsay is insufficient under the "residuum rule." Second, Zimmerman argues that, even if Mr. Ainge has satisfied all of § 413(1)'s requirements for a preliminary determination of permanent total disability, Mr. Ainge should nevertheless be disqualified from receiving benefits because he did not cooperate with Zimmerman's offer of vocation services. The Commission addresses each of these arguments below.

Sufficiency of evidence regarding Mr. Ainge's inability to perform other work. As already noted, one of the prerequisites to a preliminary finding of permanent total disability is the requirement of subsection 413(1)(c)(iv) that the injured worker "cannot perform other work reasonably available, taking into consideration the employee's (A) age; (B) education; (C) past work experience; (D) medical capacity; and (E) residual functional capacity." Zimmerman argues that the only evidence Mr. Ainge presented to satisfy this requirement was his hearsay testimony that a Job Service representative told him that "no employer would have him." Zimmerman further argues that, under the "residuum rule," Mr. Ainge's hearsay statement cannot serve as the sole basis for a finding that Mr. Ainge cannot perform other work.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or

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hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), Utah Rules of Evidence. While hearsay evidence is not generally admissible in courts of law, it is admissible in workers’ compensation proceedings. Section 34A-2-802(1) of the Utah Workers’ Compensation Act provides that: “[t]he commission, the commissioner, an administrative law judge, or the Appeals Board, is not bound by the usual common law or statutory rules of evidence The commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant” Thus, assuming a proper foundation has been established, the Commission and its ALJs may accept and consider hearsay evidence.

However, even though hearsay is admissible as evidence in workers’ compensation proceedings, it is not sufficient, standing alone, to support a finding of fact. As the Utah Court of Appeals observed in *Hoskings v. Industrial Commission*, 918 P.2d 150, 155 (Utah App. 1996)(internal citations and quotation marks omitted; emphasis added): “The Commission’s findings of fact cannot be based exclusively on hearsay evidence. To support the Commission’s findings, there must be a **residuum** of evidence, legal and competent in a court of law.” The question now before the Commission is whether there is some “legal and competent” evidence that, in addition to Mr. Ainge’s hearsay testimony, establishes that Mr. Ainge cannot, in the words of subsection 413(1)(c)(iv), “perform other work reasonably available, taking into consideration his age, education, work experience, and medical/functional capacity.”

Mr. Ainge has provided direct, non-hearsay testimony that establishes his relatively advanced age, minimal education, limited work experience, and significant medical/functional limitations. He has also submitted direct testimony that his contact with Job Service failed to result in any job referrals. This testimony, based on Mr. Ainge’s own knowledge, is not hearsay. It constitutes a “residuum” of legally competent evidence that supports a finding that Mr. Ainge cannot perform other work reasonably available. Other evidence, including Mr. Ainge’s hearsay account of his conversation with a Job Service representative, also supports that finding. The Commission therefore concludes that the evidence, including both hearsay and non-hearsay evidence, establishes that Mr. Ainge cannot perform other reasonably available work.

Co-operation with vocation services. Zimmerman contends that Mr. Ainge should be disqualified from receiving disability benefits under § 413 because he refused to accept Zimmerman’s offer of vocational services. This argument is based on Mr. Ainge’s statement to Zimmerman’s vocational counselor that he did not desire vocational services because he was physically unable to work.

Assuming only for purposes of discussion that, at this preliminary stage of a claim for permanent total disability, § 413 imposes a duty on injured workers to cooperate with employers’ offers of vocational services, the circumstances of this case do not support a conclusion that Mr. Ainge violated that duty. Zimmerman’s vocational counselor made a generalized offer of assistance that lacked any detail or plan of action. Mr. Ainge responded by advising the counselor that he did believe he was capable of working. No further action was taken by either Mr. Ainge or the

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vocational counselor.

The Commission does not perceive the foregoing casual offer of vocational assistance and Mr. Ainge's response as constituting a "failure" or "refusal" to cooperate. The Commission therefore declines to disqualify Mr. Ainge from receiving benefits on that basis.

ORDER

The Commission affirms Judge Lima's decision and remands this matter to Judge Lima for such additional action as is necessary to conclude the adjudication of Mr. Ainge's claim for workers' compensation benefits. It is so ordered.

Dated this 18th day of July, 2008.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.